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IN THE

Supreme Court Of The United States

OCTOBER TERM 1984

NO. 84-515

MARGARET SPAULDING, *et al.*,
Petitioners,

v.

UNIVERSITY OF WASHINGTON,
Respondent,

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT
RESPONDENT'S BRIEF IN OPPOSITION

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v.

UNIVERSITY OF WASHINGTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT RESPONDENT'S BRIEF IN OPPOSITION

Respondent University of Washington respectfully requests that this Court deny the instant petition for writ of certiorari. The petition seeks review of the opinion of the United States Court of Appeals for the Ninth Circuit by United States Circuit Judge Wallace affirming the decision of the United States District Court for the Western District of Washington at Seattle by Chief United States District Judge McGovern.[1] The Ninth Circuit's opinion is reported at 740 F.2d 686 (1984) and is contained in Appendix A of the petition.[2] The district court's opinion is unofficially reported at 35 F.E.P. Cases 168 (W.D. Wash. 1981) and is contained in Appendix B of the petition.

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[1] This is not the nationally publicized Washington State "comparable worth" case. That case is presently pending in the United States Court of Appeals for the Ninth Circuit (No. 84-3569).

[2] All references hereinafter to appendices are to appendices in the original "Petition For A Writ of Certiorari."

SUPPLEMENTAL STATEMENT OF THE CASE

Findings of Fact/Response to Petitioners' "Statement of Case"

Petitioners' Statement of Case ignores the district court findings even though the Ninth Circuit affirmed those findings on appeal. Petitioners likewise fail to analyze the legal issues in the context of those findings. Rather, they selectively describe elements of their evidence in the "Petitioners' Proof" section of their "Statement of Case." Then, throughout the remainder of their petition, they restate this evidence as if it were the factual background against which the legal issues should be considered. The net result is that this Court is being invited to render an opinion in this case on a fictional set of facts.

The actual findings of the district court form the appropriate background for consideration of the present petition; these findings can be summarized as follows. The district court found that the University of Washington ("University") is a major research institution of higher education and has historically organized its faculty departmentally by academic discipline. (FF 13, App. D, p. 65a.) The departments comprise 16 independently organized schools and colleges. *(Id.)* The School of Nursing is one such school. *(Id.)*

Throughout the United States, nursing has historically been considered a separate and distinct discipline and profession. (FF 22, App. D, p. 69a; FF 48, App. D, p. 75a.) This self-identification is based on disciplinary content and is not based upon sex discrimination. *(Id.)* The nursing discipline constitutes a unique body of expertise and knowledge. (FF 49, App. D, pp. 75a–76a.)

The School of Nursing internally applies the same general criteria for faculty appointments, promotions and tenure (teaching, research, publication and community service) as the other disciplines at the University. (FF 23, App. D, pp. 69a–70a.) When it comes to evaluation and interpretation of these criteria, however, the School of Nursing, like the other schools, sets its own criteria, standards and procedures appropriate to its discipline and goals. (*Id.*; FF 16, App. D, p. 66a; FF 17, App. D, p. 67a; FF 49, App. D, pp. 75a–76a.)

The School of Nursing faculty does not do work substantially equal to that of the faculty of any other discipline at the University.[3] (FF 43–52, App. D, pp. 74a–76a.) Each discipline has its own unique body of knowledge and expertise. (FF 49, App. D, pp. 75a–76a.) The content and emphasis of the courses the Nursing faculty teaches and the research it conducts are all in the field of nursing. (FF 44, App. D, p. 74a.) Their academic activities are premised upon their nursing discipline. (FF 47, App. D, pp. 75a.)

The male and female faculty within the School of Nursing are paid equitably vis-à-vis one another. (FF 51, App. D, p. 76a.) Also, the School of Nursing is as well placed in relation to its competitor schools (*i.e.*, other schools of nursing) as are the other disciplines at the University in relation to their competitor schools. (FF 30–35, App. D, pp. 71a–72a; FF–57, App. D, p. 77a; FF 59, App. D, pp. 77a–78a.) The University has treated the School of Nursing as well or better than the other schools at the University in terms of allocation of salary funds. (FF 59, App. D, p. 78a.)

REASONS WHY THE WRIT SHOULD BE DENIED

The petition in this case has no credible basis. Examination of the reasons petitioners provide in support of certiorari reveals each to be lacking. The argument below addresses petitioners' asserted reasons and explains why each is without merit.

A. The Ninth Circuit's rejection of petitioners' disparate impact theory neither conflicts with existing law nor decides an important question of federal law which has not been, but should be, decided by this Court.

1. *The Ninth Circuit's holding does not conflict with decisions of this Court.*

Although petitioners assert that the Ninth Circuit's holding

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[3] Petitioners do not contest the findings that they failed to establish a sufficient identity of their discipline and duties with the disciplines and duties of comparator males to satisfy the "equal work" standard of the Equal Pay Act, 29 U.S.C. §206(d). Thus, the pay issues raised in their petition are Title VII issues posed in a factual setting where the jobs being compared admittedly are not substantially equal.

conflicts with applicable decisions of this Court, they identify no specific decision and advance no meaningful analysis of their contention. They make only an emotionally charged caveat that the Ninth Circuit's disparate impact decision "hands every employer in a Title VII wage discrimination case a fail-safe defense" which will "slam shut the courthouse door." This scare tactic is a disservice to the Court. The Ninth Circuit carefully identified the scope of its disparate impact ruling:

> We hold that on facts such as these, where plaintiffs' sex discrimination claim is a wide ranging claim of wage disparity between only comparable jobs, the law does not go so far as to allow a prima facie case to be constructed by showing disparate impact. . . . We so hold without making any broad statement as to the general availability of the impact model in other broad based sex-wage cases.

App. A, pp. 30a–31a. This holding is not in conflict with any decision of this Court and it does not give employers a "fail-safe defense." It is, in fact, in clear harmony with the spirit and purpose of the disparate impact model.

This Court's seminal disparate impact decision is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). Analysis of *Griggs* and its progeny demonstrates the inapplicability of the disparate impact model to wage comparisons where jobs are not equal.

Disparate impact cases concern the discriminatory effect of a test or practice on people rather than on disciplines. This limitation is necessary because one can only determine whether a test or practice has an unlawful disparate impact on one group versus another if the groups are presumed equal. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et. seq.*, embodies a statutory presumption that individuals *are* equal with respect to race, sex, and certain other criteria. Accordingly, given this statutory premise, if an employer's facially neutral test or practice has a disproportionate impact on a protected group of individuals, the burden shifts to the employer to justify the practice.

But this analysis does not apply when disciplines, rather than individuals, are being compared because Title VII contains no presumption that disciplines are of equal value. Where disciplines are concerned, there is no common baseline of equality

against which the impact of the "test" or "practice" can be measured. Petitioners thus urge a radical expansion of the disparate impact analysis into areas where its underlying logic is inapplicable. This Court's opinions in no way compel this expansion, which would, as recognized by the Ninth Circuit, "plunge us into uncharted and treacherous areas." (App. A, p. 30a.)

Indeed, such expansion would be contrary to the guidance this Court has given. In *County of Washington v. Gunther*, 452 U.S. 161 (1981), this Court stressed the distinction between the adverse impact approach of *Griggs* and the strictly confined approach to wage discrimination issues necessitated by the fourth affirmative defense of the Equal Pay Act 129 U.S.C. §206(d), made applicable to Title VII wage discrimination claims by the Bennett Amendment:

> [I]ncorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials *attributable to sex discrimination*. HR Rep. No. 309, 88th Cong, 1st Sess, 3 (1963). Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

452 U.S. at 170 (emphasis supplied; footnote deleted).

This Court's emphasis on the distinction between *Griggs*-type litigation and sex-based compensation litigation indicates that disparate impact analysis cannot be applied automatically to wage discrimination litigation because the issue in such cases is not whether practices fair in form might be discriminatory in operation, but rather simply whether a pay differential is based on sex.

Furthermore, petitioners' theory of using a disparate impact analysis where unequal jobs are being compared ignores the

balance struck by the disparate impact model. Under this model, mere inequality of overall results does not automatically imply illegal discrimination. Rather, plaintiffs must identify a defined, objective employment practice which causes a significant disparity in the treatment of minorities or women. *See Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977). This requirement gives employers notice that specific policies or practices may be resulting in illegal discrimination. Application of the disparate impact model to unequal jobs would give employers little or no guidance and would only promote litigation. Employers would be required to ignore the marketplace and instead make subjective evaluations of the "worth" of unequal jobs, subject to an after-the-fact judicial determination whether the "worth" was accurately calculated.

Finally, application of the disparate impact model to determinations of whether a sex-based wage disparity exists between unequal jobs will necessarily plunge the courts into evaluating the "worth" of different jobs or disciplines. *See Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 Stanford L. Rev. 1083 (1982). This is precisely contrary to the mandate of *Gunther*.

Petitioners suggest that the methodology they used in selecting comparator disciplines was sufficient to establish a reliable base upon which different disciplines could be compared, thus eliminating the problems inherent in application of the disparate impact analysis to this type of case. In fact, however, the evidence showed, and all courts below found, that the methodology was inaccurate and unreliable.[4] Similarly, petitioners' argument that

[4] The comparable disciplines were selected by petitioners' expert, who had almost no knowledge of the programs at the University. He admitted that he started from the premise that all faculty members have similar duties. He neglected the significance of differences in terminal degrees within each discipline. He failed to take into consideration the differences in research techniques and goals, nature of publications, and types of community service associated with the different disciplines. He ignored the differences in criteria, standards and procedures utilized by each discipline in judging performance of its members. He purposely avoided selecting comparator departments containing substantial num-

they perform duties equal or similar to their selected male comparators is invalid. As Finding of Fact 46 notes, "many of the individual 'comparators' in these departments were never even mentioned during the course of trial."[5] Finally, petitioners' assertion that they somehow meaningfully measured the amount of salary differential attributable to sex discrimination is without any basis whatsoever. The district court properly found that the data base they used was totally inaccurate.[6] Even their calculation methodology was faulty.[7]

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bers of females even if those otherwise met his criteria and even though their salaries were higher than nursing salaries. Starting from his initial premise that all academicians have similar duties he arrived at the self-fulfilling conclusion that the selected departments were comparable.

[5] Petitioners' methodology also took no account of a "comparator's" experience prior to employment. It rejected rank (*i.e.*, professor, associate professor, assistant professor) as an explanation for salary differentials. It took no account of multiple degrees. It deemed all terminal degrees as fungible. It ignored all females in the "comparable departments."

[6] The data base was premised exclusively on "President's Cards." These cards were *not* the University's official employment and salary records.

Petitioners attempted to "adjust" the card data for merit incresases, promotional increases, etc. In determining whether salary increases on the cards were to be entered into petitioners' data base as merit or nonmerit increases, petitioners relied solely upon the designations in the "remarks" columns of the cards. The reasons listed for changes in salary in the "remarks" columns of the cards were proven wholly inaccurate. (FF 81, App. D, p. 82a.)

[7] Petitioners' "computer specialist," actually a two-person partnership founded approximately nine months before trial, was basically a document-indexing service for construction claims. Its experience with this type of project was nonexistent.

This "specialist" made no less than seven separate attempts to calculate purported salary differentials. Its salary differential figure started at $476,417, climbed to more than $2.2 million, and finally ended at $1.35 million.

Notwithstanding seven attempts to calculate a "wage differential," numerous errors persisted in the final attempt. Numerous instances of comparators who did not even fit petitioners' methodology were discovered in the final product.

Thus, petitioners' suggestion that the Ninth Circuit's analysis of the disparate impact model is contrary to the standards previously set by this Court is without either legal or factual support. To the contrary, the Ninth Circuit's legal analysis is sound; its rejection of petitioners' unreliable methodology and statistical "proof" conforms to this Court's instruction that such proofs should be critically examined to ensure they truly support the proposition being advanced. It is petitioners' legal theory that is in conflict with applicable decisions of this Court, not the Ninth Circuit's refusal to follow petitioners' suggested course.

2. *The Ninth Circuit's disparate impact holding does not create a conflict within the circuits.*

   a. *The Ninth Circuit's decision is consistent with the relevant holdings of the other circuit courts.*

Petitioners' argument that the Ninth Circuit's holding creates a conflict between the circuits is best dismissed by restating the Ninth Circuit's holding:

> [O]n facts such as these, *where plaintiffs' sex-discrimination claim is a wide-ranging claim of wage disparity between only comparable jobs, the law does not go so far as to allow a prima facie case to be constructed by showing disparate impact*. . . . We so hold without making any broad statement as to the general availability of the [disparate] impact model in other broad based sex-wage cases.

App. A, pp. 30a–31a (emphasis supplied).

Rather than conflicting with other circuit court decisions, the Ninth Circuit's holding accords directly with the pertinent rulings of the other circuit courts of appeal. Both the Eighth and Tenth Circuits have rejected the proposition that a Title VII prima facie case can be established simply by showing disparate wages for jobs that are not substantially equal. In *Lemons v. City & County of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980), the Tenth Circuit rejected an attempt by nurse plaintiffs to require the City of Denver to compare their jobs, for wage-setting purposes, with other dissimilar jobs of allegedly equal "worth" to the city. The court held that Title VII does not require such comparisons:

> In summary, the suit is based on the proposition that

> nurses are underpaid in City positions, and in the community, in comparison with other and different jobs which they assert are of equal worth to the employer. The relationship of pay for nurses to pay for other positions is obviously a product of past attitudes, practices, and perhaps of supply and demand. The record shows that it became a part of the economic balance and relationships prevailing in the community among the myriad positions in the job market.
>
> *This type of disparity was not sought to be adjusted by the Civil Rights Act . . . . The courts under existing authority cannot require the City within its employment to reassess the worth of services in each position in relation to all others, and to strike a new balance and relationship. . . .*
>
> *Plaintiffs are not seeking equality of opportunity in their skills as contemplated by Title VII, . . . but instead would cross job description lines into areas of entirely different skills. This would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it.*

620 F.2d at 229 (emphasis supplied).

Similarly, in *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977), the female plaintiffs sought to compare, for pay purposes, their clerical jobs with physical plant jobs held by men. The Eighth Circuit rejected the plaintiffs' argument that such a comparison could establish a Title VII prima facie case:

> [A]ppellants seek a construction of Title VII that may establish a *prima facie* violation of that Act whenever employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market. Appellants' theory ignores economic realities. The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. *We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.*

563 F.2d at 356 (footnote omitted).

Other circuit courts have decided cases where a mere showing of wage disparity between unequal jobs has been insufficient to establish a prima facie sex discrimination case under Title VII. In *Wilkins v. University of Houston*, 654 F.2d 388 (5th Cir. 1981), *vacated and remanded*, 459 U.S. 809 (1982), *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983), female faculty members sought, through statistical evidence, to establish salary discrimination on the basis of various comparisons with higher paid male faculty members. The court rejected this attempt because the plaintiffs' statistical evidence failed to recognize that legitimate differences in *discipline*, rather than sex, were the most important factors in determining pay:

> The fundamental flaw in plaintiffs' statistical evidence is that it fails to take into account the fact that a number of factors operate simultaneously to influence the amount of salary a faculty member receives. *It appears uncontroverted that the most important factor is the college in which a professor teaches—all other factors being equal, professors in colleges such as law and engineering are, because of market forces outside the university, paid significantly more than professors in colleges such as humanities and social science.*

654 F.2d at 402 (emphasis supplied).

Similarly, in *Valentino v. United States Postal Service*, 674 F.2d 56 (D.C. Cir. 1982), the court rejected an attempt, through statistics, to show sex discrimination where the plaintiffs failed to control their statistical analysis for type of education and job classification:

> When it is clear that qualification, e.g., as an economist, engineer, lawyer, computer expert, statistician, accountant, business manager, secretary, is a prime factor in the selection process, a Title VII plaintiff cannot shy away from that factor in developing her prima facie case.

674 F.2d at 71.

b. *"Conflicting" decisions relied upon by petitioners do not in fact conflict with the Ninth Circuit's holding.*

The Ninth Circuit's disparate impact analysis is not at odds with any of the four allegedly conflicting cases cited by petitioners.

None of those cases applies disparate impact analysis in the context of wide-ranging claims of wage discrimination between unequal jobs. All of them, instead, are traditional disparate treatment cases in which, at most, the courts also secondarily review specific employment practices alleged to have disparate impact.

For example, *Craik v. Minnesota State University Board*, 731 F.2d 465 (8th Cir. 1984), is actually a class-action disparate treatment case. The generalized across-the-board claim that female faculty members received lower salary than males was analyzed solely under a disparate treatment model. 731 F.2d at 479. At trial, defendants did not assert the distinct and unique nature of academic disciplines. Rather, for purposes of trial tactics, it aggregated its entire faculty into three "divisions" and generally defended its salary practices from that model. *Id.* The Eighth Circuit found that defendants had artificially "invented the 'division' categories for trial." *Id.* It found that "these categories are too broad to be meaningful, and the defendants do not use them in making salary decisions." *Id.* Accordingly, it treated all of the teaching jobs as equal for purposes of overall salary analysis. The court concluded that the existing salary differentials were the result of intentional sex discrimination. *Id.*

The only disparate impact analysis concerned "market factor" increases paid in "scarce market areas." 731 F.2d at 480. Although these increases went almost exclusively to males, the court concluded they were justified by greater market demand. *Id.* (*See* n. 10 *infra.*) It was unnecessary for the Eighth Circuit to determine whether the plaintiffs had established a prima facie disparate impact case and it did not do so. Furthermore, to the extent the *Craik* court applied any disparate impact analysis, it did so against a background of proven intentional discrimination. Thus, even if the court had held that plaintiffs proved a prima facie disparate impact case, that holding would not conflict with the Ninth Circuit's ruling that showing job comparability *without more*, is insufficient to satisfy a wage discrimination plaintiff's burden under the disparate impact model.

Petitioners also claim that the Ninth Circuit's decision conflicts with *Bryant v. International Schools Services, Inc.*, 675 F.2d 562 (3d Cir. 1982), and *EEOC v. Ball Corp.*, 661 F.2d 531 (6th Cir.

1981). *Bryant* and *Ball*, however, bear no meaningful resemblance to the present case. In *Bryant*, the defendant provided teachers for a school in Iran attended by children of American workers. The company hired its teachers from among applicants in the United States and applicants already living in Iran. Because of a perceived need to provide an incentive encouraging Americans to relocate to Iran, the company paid greater benefits and wages to the persons hired in the United States. No such incentives were necessary for persons hired in Iran because they were already located there.

The Third Circuit applied disparate impact analysis to the company's "dual contract" policy but determined that plaintiffs had failed to make a prima facie case because the majority of persons awarded the more lucrative "American" contracts were women. 675 F.2d at 574. The court's analysis never addressed the issue of job comparability because all the teaching jobs were identical. Under even the broadest interpretation, *Bryant* stands only for the proposition that impact analysis might be appropriate where job qualifications are equal, the jobs themselves are identical, and the wages paid male and female employees are different. *See* 675 F.2d at 577 (concurring opinion). *Bryant* in no way conflicts with the Ninth Circuit's determination that disparate impact cannot be shown where jobs are only comparable.

EEOC. v. Ball Corp. likewise accords with the Ninth Circuit's holding. *Ball* is essentially a disparate treatment case concerning the defendant's policy of preventing or actively discouraging women from occupying the more highly paid "production" jobs in the company's plant. Women were instead relegated to lower paid "finishing" jobs. The Sixth Circuit held that the EEOC had produced sufficient evidence of disparate treatment to make a prima facie case. The only "impact" analysis in *Ball* related to the company's lunch policy. Under this policy, employees working as "finishers" (almost exclusively women) worked an 8-hour shift with a one-half hour unpaid lunch break. "Production" workers (primarily male) worked a fully paid 8-hour shift and ate lunch on the run. This policy, the Sixth Circuit determined, had a disparate impact on women because it operated to preclude more women than men from working a full 8-hour day. The court's impact

analysis thus considered neither the comparability of jobs nor the wage rates paid to male or female employees. It related only to the effect of a specific employer policy regulating the hours male and female employees were permitted to work.

Finally, petitioners contend that the Ninth Circuit's holding in this case conflicts with the District of Columbia Circuit's decision in *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984).[8] This conflict, petitioners appear to contend, arises from the Ninth Circuit's reliance on *Pouncy v. Prudential Insurance Co. of America*, 668 F.2d 795 (5th Cir. 1982). The Ninth Circuit cited *Pouncy* for the proposition that:

> [t]he discriminatory impact model of proof . . . is not, however, the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices.

App. A, p. 33a (quoting *Pouncy*, 668 F.2d at 800). The Ninth Circuit went on to hold, quoting *Pouncy*, that mere payment of market wages does not constitute a "selection procedure" in which the disparate impact model applies. *Id.*

Contrary to petitioners' assertions, *Segar* and *Pouncy* do not conflict with respect to these propositions. Neither case stands even remotely for the proposition that employer reliance on the marketplace when setting wages constitutes a facially neutral practice for purposes of Title VII disparate impact analysis. *Pouncy* rejects the concept that such a diffuse "practice" can qualify for disparate impact analysis. *Segar* applied disparate impact analysis only to a specific employer requirement of prior law enforcement experience. *See Segar v. Smith*, 738 F.2d at 1287-88.

The difference between the rulings of the *Segar* and *Pouncy* courts, if any, is whether plaintiffs, rather than defendent employers, must always bear the burden of initially identifying the

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[8] *Segar* is a class action in which a class compromised of black agents of the federal Drug Enforcement Agency ("DEA") alleged a pattern or practice of across-the-board discrimination. To the extent salary comparisons were at issue, they related to identical, not "comparable," jobs.

facially neutral employment practice.[9] This question of burden allocation is not an issue in the present case.[10] Thus, even if *Pouncy* and *Segar* did disagree with respect to *who* must identify a facially neutral practice for purposes of a prima facie disparate impact case, this conflict would not be material to the Ninth Circuit's decision in this case, nor would it give rise to any conflict between either *Pouncy* or *Segar* and the Ninth Circuit's ruling.

3. *The Ninth Circuit's decision does not raise an important question of federal law which should be decided by this Court.*

The Ninth Circuit's opinion is in the mainstream of cases concerning comparison of unequal jobs. It is consistent with the cautious tone of *Gunther* regarding the ability of the courts to ascertain the "worth" of different skills. Should any change in that fundamental approach be called for, it surely is more appropriately addressed in the legislative rather than the judicial forum.

B. The Ninth Circuit properly rejected petitioners' "comparability plus" test.

Petitioners claim that the Ninth Circuit improperly rejected the "comparability plus" theory they devised in their attempt to prove disparate treatment. Petitioners describe their "comparability plus" theory as a sliding scale test in which the nature of the evidence of intentional discrimination varies in inverse proportion to the "comparability" of the job shown.

Petitioners' theory is unworkable and was properly rejected by the Ninth Circuit. First, petitioners' theory would do what this

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[9] *Pouncy* reflects a typical discriminatory impact analysis under which the plaintiff is required to identify some specific facially neutral employment practice as an element of a prima facie case. *Segar* expands this analysis to reach cases where the facially neutral employment practice has been articulated by the defendant employer in response to an initial "pattern and practice" disparate treatment showing. Under these circumstances, the *Segar* court suggested, disparate impact analysis can be employed because all the requisite elements are present. According to this view, it makes no difference whether the facially neutral practice is identified by the plaintiff or the defendant employer.

[10] This Court should note that even if the University were required in this case to establish the business necessity of its practice of relying on

Court explicitly refused to do in *Gunther*: impose a precise formula for trying Title VII wage discrimination litigation. As the Ninth Circuit recognized: "[s]uch an unwieldly test might allow plaintiffs to bolster inadequate showings of comparability with a confusing potpourri of 'plus factors,' plunging courts into standardless supervision of employer/employee relations." App. A, p. 20a.

Second, there is no factual basis for application of petitioners' theory in this case. The "comparability-plus" rationale acknowledges the need to show discriminatory animus (the "plus" factor), but petitioners made no such showing. To the contrary, the Findings of Fact affirmatively reject the existence of discriminatory intent. *See, e.g.*, Findings 34, 41, 54, 57, 58, 76-79, 82-84. (App. D.) Conclusion of Law 5 summarizes, "There is no showing of discriminatory intent or motive in this case." (App. D, p. 84a.)

Petitioners' further argument that the Ninth Circuit's opinion "improperly limited *Gunther* to the examples of blatant intentional discrimination set forth therein" is baseless. The Ninth Circuit did not limit *Gunther*. It merely rejected petitioners' formula approach and discounted their evidence of discriminatory animus.

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the marketplace in setting wages, the Findings of Fact demonstrate that this burden was satisfied. Findings of Fact 53 and 54 state:

> 53. The University of Washington competes in a national market for its faculty members along with other major academic institutions. One of the factors which is considered in setting individual salaries is the wage level at other comparable institutions for persons within a particular discipline or subspecialty. *Different disciplines command different general salary ranges regardless of the sex of the particular faculty member. Such market considerations relate to discipline, not to sex.*
>
> 54. *The University could not ignore market pressures and continue to attract the quality of personnel needed to maintain it.* The University is as competitive in the market for nursing faculty as it is, on average, with other disciplines. There was absolutely no evidence that the University's reliance on market place factors was pretextual and/or used for the purpose of discriminating against nursing faculty because of sex.

(App. D, pp. 76a-77a) (emphasis supplied).

Finally, petitioners assert several untenable premises in their discussion of "comparability plus." The first, found on page 18 of the petition, is:

> The district court refused to hear any evidence of intentional discrmination [sic], holding that the Bennett Amendment to Title VII precluded such a claim under Title VII.

This statement is false. The special master specifically ruled at trial that evidence of intentional discrimination was admissible.[11] Petitioners introduced evidence on the point. The district court made findings dealing with the issue. *See, e.g.*, Findings 34, 41, 54, 57, 58, 76–79, 82–84. (App. D.) Petitioners' statement that they were not allowed to present evidence is misleading and incorrect.

A similar statement is petitioners' assertion that the district court "conceived of petitioners' case as based solely on Equal Pay Act standards." Petition at 19. The district court's Findings of Fact and Conclusions of Law recognize petitioners' Title VII claim and specifically acknowledge that under Title VII plaintiffs were "not necessarily required to establish the performance of substantially equal work as required under the Equal Pay Act." Conclusion of Law No. 4, App. D, p. 84a.[12]

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[11] At trial, in connection with petitioners' efforts to introduce evidence of discriminatory intent, the special master ruled:

> one of the issues with respect to Title 7 is whether or not there is intentional discrimination or intentional treatment of women on a basis different from men. There is an allegation that is so, that they intended to do that. What they are doing, I think, is offering evidence which they will argue . . . circumstantially indicate[s] . . . that that is indicative of their intentions . . . it seems to me that they have the opportunity to argue that. And I am going to admit it for that purpose and allow him that leeway.

(RT I:102)

[12] After the Ninth Circuit's decision in *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1980), *aff'd*, 452 U.S. 161 (1981), the special master requested briefing from the parties on the impact of that holding. He had all appropriate legal standards before him when he made his report to the district court, including proposed findings of fact and conclusions of law. His "Report of Special Master" (App. C) deals

In summary, petitioners' "comparability-plus" theory lacks any legal or factual basis and was properly rejected by the Ninth Circuit.

C. The district court correctly reviewed the magistrate's factual findings under Rule 53's "clearly erroneous" standard; this standard of review did not violate any Article III rights of petitioners.

Congress has expressedly recognized the importance of prompt resolution of Title VII cases. Section 2000e-5(f)(5) provides:

> It shall be the duty of the judge designated pursuant to this subsection to assign the case for hearing at the earliest practicable date and to cause the case to be in every way expedited. *If such judge has not scheduled the case for trial within one hundred and twenty days after issue has been joined, that judge may appoint a master pursuant to rule 53 of the Federal Rules of Civil Procedure.*

(Emphasis supplied.)

Rule 53, provides, in relevant part:

> (b) A reference to a master shall be the exception and not the rule. . . . [I]n actions to be tried without a jury . . . a reference shall be made only upon a showing that some exceptional condition requires it.
>
> • • •
>
> (e)(2)
> In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous.

Pursuant to Title VII's mandate to hear cases at the earliest practical date, the district court referred this case to a United States magistrate to sit as a special master. The order of reference was "pursuant to Rule 53, Federal Rules of Civil Procedure, and

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almost exclusively with the impact of *Gunther*. This Court issued its decision in *Gunther* affirming the Ninth Circuit between the time the special master's report was prepared and the district court made its final decision. That case was before the district court.

42 U.S.C. § 2000e-5(f)(5) and local Magistrate's Rule 21."[13] The order of reference specified:

> [The Special Master's] report shall be subject to review by this court in accordance with the provision of Rule 53(e). . . .

No party challenged the order of reference. In fact, several years later, shortly before trial, the parties submitted an agreed pretrial order which specifically acknowledged that the special master was to hear the case "pursuant to 42 U.S.C. § 2000e-5(f)(5) and Fed. R. Civ. P. 53." (CR 200).

After trial the special master submitted Recommended Findings of Fact and Conclusions of Law to the district court which were adverse to petitioners. Petitioners then raised for the first time the argument that the master's findings should be reviewed de novo.

The district court rejected petitioners' claim of entitlement to de novo review and proceeded to review the special master's findings pursuant to the clearly erroneous standard of Rule 53. The district judge examined the trial transcript, the special master's report, the special master's Recommended Findings of Fact and Conclusions of Law and the associated briefing and argument of the parties. The court then entered a 21-page order adopting in part and modifying in part the special master's recommendations. The United States Court of Appeals for the Ninth Circuit reviewed the district court's decision pursuant to Rule 52(a) and affirmed.

Petitioners contend that both the district court and the Ninth Circuit erred by not reviewing the special master's findings de

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[13] The local rule provided:

> In accordance with 28 U.S.C. §636 (b) (2), the full-time magistrates in this district, upon reference by a district judge, may, without additional compensation: . . .
>
> (b) Serve as special master to try the issues in employment discrimination cases under Title VII of the Civil Rights Act of 1964, as amended [42 U.S.C. § 2000e-5(f)(5)], without regard to the provisions of Rule 53(b), whenever the district judge determines that the case could not be scheduled for trial within one hundred twenty (120) days after issue is joined.

novo. Petitioners' arguments lack merit; Congress has provided, lawfully and plainly, for referral of certain Title VII cases to special masters subject to the "clearly erroneous" standard of review.

1. *This case was properly referred under Rule 53.*

Petitioners first argue that the district court's Order of Reference cannot stand on the bases of Rule 53 and 42 U.S.C. § 2000e-5(f)(5). Their argument is that the "exceptional condition" requirement of Rule 53 persists and, notwithstanding 42 U.S.C. § 2000e-5(f)(5), inability to hear a case within 120 days does not qualify a case for reference under Rule 53.

This argument is without merit. Section 2000e-5(f)(5) represents a congressional determination that, because of the important policy considerations favoring expeditious hearing of discrimination cases, potential delay in the trial of such cases either satisfies the "exceptional condition" requirement of Rule 53 or justifies its waiver. Congress' purpose in this regard is clear from the legislative history of Section 2000e-5(f)(5). The language of this section was added by Senate amendment to the Equal Employment Opportunity Act of 1972. *See* Legislative History of the Equal Employment Opportunity Act of 1972, Subcomm. on Labor of Senate Comm. on Labor and Public Welfare, 92d Cong., 2d Sess. 1683, 1731-32 (1972) ("Legislative History".) Senator Javits, the amendment's sponsor (along with Senators Cooper and Williams), stated its purpose succinctly:

> [The amendment] arose from the Dominick amendment, on which the Senator from Kentucky (Mr. Cooper) based his position that the courts could proceed *as they wished* on the appointment of a master under rule 53 of the Federal Rules of Civil Procedure. *The normal rule as to the ability of the court to appoint a master if it wishes under rule 53 is quite stringent—the case must be truly exceptional to qualify. All this amendment does is relax that stringency in the area of Title VII cases, where justice delayed is very often justice denied.*

Legislative History at 1731-32 (emphasis supplied).

Thus, contrary to petitioners' assertion that "there is no evidence that Congress intended such a 'relaxation' of Rule 53 so as to nullify the limitations of Rule 53(b)," the legislative history estab-

lishes that Congress had precisely that intention when Title VII cases could not be tried within 120 days.

Every circuit court that has considered the question agrees. *See White v. General Services Administration*, 652 F.2d 913 (9th Cir. 1981); *Hackley v. Roudebush*, 520 F.2d 108, 153 n.181 (D.C. Cir. 1975); *cf. Cockrham v. South Central Bell Telephone Co.*, 695 F.2d 143 (5th Cir. 1983) (scope of review is Rule 53(e)'s "clearly erroneous"). As the Ninth Circuit noted in *White v. General Services Administration:*

> Despite the statutory language [of 42 U.S.C. § 2000e-5(f)(5)] providing for appointment of a master pursuant to Rule 53, it is clear that Congress intended to relax that Rule's stricture that reference shall be made "only upon a showing that some exceptional condition requires it." . . . There would have been little reason for the statute had Congress merely wished to confine referrals to the extremely limited instances contemplated by Rule 53(b). We therefore view the citation to Rule 53 in § 2000e-5(f)(5) as manifesting congressional intent to incorporate all of the rule except the severe restrictions upon reference.

652 F.2d at 915 (citations omitted). *Accord, Spaulding v. University of Washington.* App. A, pp. 9a-11a. The fundamental premise of petitioners' argument—that the district court's order of reference was not appropriate under Rule 53—therefore fails.[14]

2. *Reference of Title VII cases to a special master under Section 2000e-5(f)(5) and Rule 53 is constitutional.*

Petitioners additionally contend that under the Ninth Circuit's interpretation of Section 2000e-5(f)(5) in *White v. General Services Administration* "a district court may, without the consent of the parties, refer any Title VII case to the United States Magistrate 'as special master.' " Petition at 21. According to petitioners, this deprives Title VII litigants of a constitutional right to have

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[14] Petitioners' second argument—that the reference also fails under 28 U.S.C. § 636(b)(2)—is also predicated upon the premise that the order of reference did not meet the Rule 53/42 U.S.C. § 2000e-5(f)(5) standard. As discussed above, that premise is inconsistent with Title VII, the relevant statutory history and all case law on the subject.

their case reviewed and decided by an Article III judge, under the reasoning of *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982). This deprivation, petitioners argue, can be corrected only by providing for de novo review in the district court.

Petitioners do not challenge, however, the "exceptional circumstances" requirement of Rule 53(b). *See La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957). They thus impliedly concede that if such circumstances are present, a nonconsensual reference to a special master is constitutionally valid even though review in such a case would be governed by Rule 53's "clearly erroneous" standard. Petitioners' constitutional argument must therefore rest on the proposition that Congress could not, in the exercise of its power to create or modify federal statutory rights, determine that such rights would be best served through reference to a special master where lengthy trial delay would otherwise ensue. Petitioners' argument is wide of the mark.

First, while this Court held in *La Buy v. Howes Leather Co.*, that references to special masters should take place only under "exceptional circumstances," the Court was simply construing Rule 53(b). As the Second Circuit recognized in *Collins v. Foreman*, 729 F.2d 108, 118 (2d Cir.), *cert. denied*, 53 U.S.L.W. 3240 (U.S. 1984), this Court, in *La Buy*, did not hold that reference to special masters under more relaxed standards would be *unconstitutional*, but merely that it was not authorized by Congress and would be undesirable on policy grounds (namely, that special masters are temporary ad hoc substitutes inexperienced in judicial work). *See La Buy*, 352 U.S. at 253 n.5, 259. *See also Cruz v. Hauck*, 515 F.2d 322, 330 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976) ("[t]he ineluctable conclusion is that the 'exceptional condition' limitation [in Rule 53] results from the deficiencies of the master system rather than constitutional limitations upon non-Article III judges.") In the present case, Section 2000e-5(f)(5) provides a clear expression of congressional intent to relax or declare satisfied the "exceptional circumstances" requirement of Rule 53. Furthermore the policy objections identified in *La Buy* are eliminated where United States Magistrates serve as special masters. Magistrates are skilled judicial officers, not temporary,

ad hoc, inexperienced appointees.

Second, the delegation of judicial power to non-Article III bankruptcy judges struck down in *Northern Pipeline* bears no resemblance whatever to the scheme contemplated by Section 2000e-5(f)(5). The Bankruptcy Act invalidated in *Northern Pipeline* conferred vast jurisdiction on bankruptcy judges and empowered them to adjudicate a multitude of rights *not created by Congress*. Section 2000e-5(f)(5), on the other hand, provides only that a district court may, on a case-by-case basis and under specific circumstances, refer cases to a special master in order to further Title VII's policy of speedy adjudication. Congress directed this result in conjunction with federal statutory rights it created. *Northern Pipeline* recognized that Congress has wide discretion to establish and limit the manner in which federal statutory rights are redressed. 458 U.S. at 80 ("[I]t is clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—*including the assignment to an adjunct of some functions historically performed by judges.*") (footnote omitted). *Northern Pipeline* thus presents no consitutional barrier to the special master reference provided for by Congress in Section 2000e-5(f)(5) and employed by the district court in the present case.

D. The Ninth Circuit correctly refused to undertake de novo review of the record.

Petitioners also contend that the Ninth Circuit erred by failing to review de novo the lower court's findings of fact. According to petitioners, de novo review was appropriate because these factual findings were based on an error of law.[15] This error, petitioners'

[15] While petitioners correctly state the rule that factual findings may be set aside if they rest on an erroneous legal conclusion, they are incorrect in suggesting that the appellate court may review the findings de novo under such circumstances. *See Pullman-Standard v. Swint*, 456 U.S. 273 (1982). Thus, even if petitioners' premise that the lower court committed some error of law were correct (which, as demonstrated in text, *infra*, it is not), de novo review of the district court's findings by the Ninth Circuit would still have been improper.

argument continues, was the conclusion that Equal Pay Act standards of "substantial equality" governed both petitioners' equal pay *and* Title VII claims—a result inconsistent with *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1980), *aff'd*, 452 U.S. 161 (1981).

Petitioners' argument is meritless. Prior to drafting recommended findings of fact and conclusions of law, the special master requested briefing on precisely the question of whether *Gunther* dictated any change in his initial decision to dismiss both the Equal Pay Act and Title VII claims of petitioners. After reviewing this briefing, the special master concluded that even though petitioners' failure to demonstrate "substantial equality" did not necessarily foreclose them from proving prima facie sex discrimination case under Title VII, their evidence failed to do so. (App. C, pp. 59a-61a.) The district court's Conclusion of Law No. 4 states:

> In order to prove a case of salary discrimination under Title VII, *although not necessarily required to establish the performance of substantially equal work as required under the Equal Pay Act, plaintiffs must establish discrimination in salary on the basis of sex and, without more, a showing that the teaching work done by plaintiffs is in a broad sense comparable to the teaching work done by faculty in other departments of the university is insufficient to establish a prima facie violation of Title VII.* In enacting Title VII, and in particular the Bennett Amendment, Congress did not intend to substitute a "comparable work" standard in establishing a claim of discrimination in compensation under Title VII.

App. A, p. 57a; App. D, p. 84a (emphasis supplied).

This legal conclusion comes directly from the Ninth Circuit's decision in *Gunther:*

> We do note that, because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficient to establish a prima facie case.

623 F.2d at 1321. *See* App. C, pp. 60a-61a.

Thus, contrary to petitioners' assertion, neither the district court nor the special master labored under any misapprehension as to the applicable legal standards in this case. Both the special master and the district court were well aware that petitioners' failure to prove substantial equality did not foreclose them from establishing a Title VII prima facie case by some other means.[16]

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[16] The quotations from the district court opinion contained in the Petition are not to the contrary .The quotations are taken out of context and do not reflect the entire opinion of the court.

The first quotation is a description of the basic position the petitioners advanced at trial: that they were doing substantially equal work. That was petitioners' only position under the Equal Pay Act and their primary position under Title VII.

The second quotation—that the work done by petitioners is, broadly speaking, comparable but not substantially equal—is a relevant consideration under both the Equal Pay Act and Title VII. In actual fact, however, the quotation relied upon by petitioners to show the district court did not understand their Title VII case is taken from the portion of the district court's opinion discussing petitioners' express claim that they were doing substantially equal work.

The third quotation is taken out of context. The district court made the statement while discussing the use of the instructor rank in the School of Nursing. The statement that salary differences are material only if those salaries are in the context of equal jobs is accurate in this case because there was no showing of discriminatory animus. The mere showing of unequal pay for unequal jobs shows nothing. *Gunther v. County of Washington*, 623 F. 2d at 1321.

The fourth and fifth quotations are also taken out of context. They arise in the district court's discussion of petitioners' statistical studies. The court's observation that the theory of petitioners' case remained unequal pay for equal work describes the thrust of petitioners' action at trial and the only theory they had left available to them given their failure to prove discriminatory motive in wage setting. That the district court considered their Title VII allegations under appropriate standards is apparent from the findings of fact dealing with discriminatory animus, Conclusions of Law Nos. 4 and 5 (dealing with elements of proof under Title VII after *Gunther* and the absence of any proof of discriminatory intent), and the court's recitation regarding its review of the numerous memoranda submitted by the parties in connection with both the Ninth Circuit and Supreme Court opinions in *Gunther*. *See* App. B, pp. 42a-43a.

But petitioners' evidence failed to do so. Petitioners' Equal Pay Act claim was dismissed because they failed to show substantial equality. Petitioners' Title VII claim was dismissed because they could show no more than "comparability," which was insufficient to establish a prima facie Title VII case under *Gunther*. The factual findings of the special master and the district court were therefore grounded in correct legal standards and the Ninth Circuit properly reviewed the district court's decision under the "clearly erroneous" standard of Rule 52(a) of the Federal Rules of Civil Procedure.

CONCLUSION

The Ninth Circuit's decision in this case accords with the pertinent rulings of this Court and the other circuit courts of appeal. In addition, petitioners failed at trial to establish the facts necessary to raise the issues they identify as appropriate for further review. For these reasons, this Court should deny the petition for writ of certiorari.

Respectfully submitted,

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